

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

**MEDICAL DIAGNOSTICS LABORATORIES,
GENESIS**

Respondent

and

Case 22-CA-250467

**DISTRICT 1199J, NATIONAL UNION OF
HOSPITAL & HEALTHCARE EMPLOYEES,
AFSCME, AFL-CIO**

Charging Party

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

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I. STATEMENT OF THE CASE

On October 23, 2019¹, District 1199J, National Union of Hospital & Healthcare Employees, AFSCME, AFL-CIO, (“Union”), filed a charge in Case No. 22-CA-250467 alleging that Medical Diagnostics Laboratories, Genesis (“Respondent”) terminated its employee Miguel Hernandez (“Hernandez”) because of his support for, and activities on behalf of the Union. On January 27, 2020, the Regional Director issued a Complaint and Notice of Hearing based upon the allegations of the instant charge.

A Hearing was held before Administrative Law Judge Kenneth W. Chu on February 2 and 3, 2021. All parties were given an opportunity to call and cross-examine witnesses and to present evidence at the hearing. Although Respondent argues that Hernandez was discharged for cause, the credible and overwhelming evidence establishes that Respondent unlawfully discharged Hernandez as alleged in the Complaint and Notice of Hearing.

II. STATEMENT OF FACTS

A. Background

Respondent is a medical testing facility located in Hamilton, New Jersey. (GC Ex.1)² Respondent employs laboratory technicians (“Lab Techs”) who are responsible for testing specimens received from doctors’ offices and other medical facilities for the presence of various diseases. (Tr.38)

During the time period relevant to the instant unfair labor practice allegations, Respondent’s management consisted of Owner/Founder Dr. Eli Mordechai, then Human

¹ All dates herein refer to 2019 unless otherwise indicated.

² GC Ex. Denotes Acting General Counsel Exhibits - (a) is a recording and (b) is the corresponding transcript R. Ex. Denotes Respondent Exhibits. (a) is a recording and (b) is the corresponding transcript. (b) xx:xx denotes time mark of recording. J. Ex denotes Joint Exhibits. Tr. Denotes Trial transcript.

Resources Director Stephanie Berry,³ Director of the Laboratory Peter Winchester,⁴ Vice-President of Laboratory Operations Kelly Winchester (spouse of Pete Winchester), Human Resources Manager Alyssa Westfall, and Lead Human Resources representative Brianna Reed.⁵ There are also a number of Laboratory Coordinators who are front-line supervisors. (Tr. 38, 147, 269, 314, J. Ex. 2)

Hernandez worked as a Laboratory Technician for Respondent for several years. (Tr. 36) He first worked for Respondent in 2017, and left voluntarily after working for approximately one year. (Tr. 37) He was rehired by Respondent in 2018 and worked until his discharge on October 11, 2019. When he was rehired in 2018, Hernandez signed a series of documents, including Laboratory Safety Practices and an Employee Handbook. (Tr. 69, J. Ex. 9 and J. Ex. 12). Respondent's Laboratory Safety Practices Checklist includes, under General Safety Practices, "No eating, drinking, applying cosmetics or manipulating contact lenses in the lab" as point number three, "Always wash hands and change gloves" as point number five and "Use personal protective equipment (i.e. gloves, lab coats, shields)" as point number six. (J. Ex. 9)

The Employee Handbook, under the heading "Standards of Conduct" prohibits certain conduct such as workplace violence. Workplace Violence includes "Yelling, screaming, use of obscenities or foul language." (J. Ex. 12 pg. 37 bullet point 8) In addition, the "Personal Appearance" section of the Employee Handbook states that Laboratory Employees "must wear lab coat and long pants for safety and sanitary reasons." (J. Ex. 12 pg. 27) and under the "Safety Precautions" section, the Employee Handbook requires that "Employees must immediately report any unsafe condition to their supervisor or the Human Resources Director."

³ At the time of the hearing, Berry was Respondent's Vocational Officer. (Tr. 336)

⁴ Respondent stipulated that Pete Winchester is the Vice-President of Laboratory Operation. However, it appears from the testimony that he is actually the head of the Lab and that Kelly Winchester is the VP.

⁵ Brianna Reed was formerly the HR Representative/HRAS Specialist in 2019. (Tr. 201, J Ex. 2)

B. Hernandez is Issued a Warning for Insubordination

In late 2018, Hernandez was working at his Laboratory workstation when Coordinator Louis Kopack approached him and asked how he (Hernandez) “felt” about “doing a partial fin [sic] prep.” (Tr. 37) Since Hernandez was performing a task that he considered crucial and did not consider Kopack’s comment a work direction, he replied, “I’d rather not.” (Tr. 37, 159) Kopack did not express any immediate concerns over Hernandez’s response. He said nothing and just moved on. Kopack did not take any action against Hernandez nor, at that moment, did he report the incident to upper management. Because there was no negative response from Kopack, Hernandez did not think the interaction important or notable. In fact, Kopack did not report the incident to upper management until several weeks later while Respondent was conducting an investigation into another matter.⁶ As a result of that report, Respondent issued Hernandez discipline on December 21, 2018 for insubordination. Although he did not agree with it, Hernandez signed the discipline since he did not fully understand the consequences of accepting it. (Tr. 43) This is the only discipline Hernandez ever received. (J. Ex. 13 and J. Ex.14)

Several months later, in early 2019, a promotion opportunity came up in the Laboratory. Hernandez applied for the position, but was denied the promotion. On February 21, HR Manager Westfall and HR Director Berry informed Hernandez that because of the discipline he had received for the Kopack incident, he was disqualified from any promotion for one year. (Tr. 41, 43, J. Ex. 15) Prior to being informed by the HR officials, Hernandez was unaware that the discipline he accepted would disqualify him from advancement. After learning of the

⁶ This investigation involved Brittany Mucha, a Coordinator and Hernandez’ fiancée, allegedly showing Hernandez preferential treatment. (Tr. 17, 38, 120). Hernandez was not disciplined for receiving preferential treatment, but Mucha was issued a reprimand. (J. Ex. 15)

consequence of the discipline, Hernandez was determined to fight it to have it removed from his record, so that it would not interfere with his advancement at the workplace. (Tr. 43)

C. Respondent's Claim that Hernandez's Repeated Requests for Meetings with Management Caused His Discharge is not Supported by the Record

At trial, Respondent attempted to paint Hernandez as a difficult employee who, according to Respondent, repeatedly demanded to meet with management regarding issues of interest to himself, even after purportedly being told to cease such demands. The record and testimony bely Respondent's unsubstantiated claims that it told Hernandez not to request meetings and that Hernandez acted in a manner that could reasonably be considered "difficult". To the contrary, the record, particularly the numerous audio recordings⁷ of meetings between management and Hernandez, completely undermine Respondent's asserted basis for discharging Hernandez.

Starting in February 2019, Hernandez asked for and was granted meetings with Respondent to discuss the December 2018 insubordination discipline. On February 22, Hernandez met with HR Manager Westfall to dispute the Kopack discipline but his request to overturn the discipline was denied. (J. Ex. 15) He asked for and was granted another meeting which occurred on March 1. At this meeting, HR Liaison Brianna Reed, HR Manager Alyssa Westfall, and the head of the Laboratory Pete Winchester (Tr. 44) were present. Hernandez recorded this meeting. (R. Ex. 19) The recording establishes that, despite Respondent's

⁷ Respondent submitted 4 audio recordings R. Ex 19(a) through R. Ex. 22(a) and their corresponding transcripts R. Ex. 19 (b) through R Ex. 22(b). Acting General Counsel submitted three recording GC Ex. 4(b), 5(b) and 6(b) and their respective transcripts 4(a), 5(a) and 6(a). Pursuant to suggestion by Your Honor the parties agreed to admit the recordings and their transcripts after off the record review without Hernandez being recalled. Transcripts of certain of the recordings only attribute statements to "unidentified female speaker." However, testimony by Acting General Counsel's witness and those of Respondent about the events of the meetings identify the speakers as being either certain of Respondent's witnesses or other human resources or managerial employee of Respondent. At no time did Respondent dispute that any unidentified speaker on any recording was anything other than a representative of Respondent. Further, the context of the recording in relation to the testimony of the witnesses at trial helps to identify the speaker. Finally, Respondent never disputed the validity or accuracy of the recordings or their transcripts were with Respondent representatives.

assertion to the contrary, Hernandez was calm and reserved during this meeting. He did not raise his voice or act in an otherwise unprofessional manner.

Hernandez was again informed at this March 1 meeting that his request to overturn the insubordination discipline was denied. (Tr. 44) The meeting then centered on Respondent's perception, particularly Pete Winchester's, of Hernandez as an employee. Winchester and the other officials cited areas in which they thought Hernandez needed to improve so that at the proper time, he could be promoted. Specifically, they said that he should be more of a team player and that he often spent a lot of time isolated in the laboratory⁸. (Tr. 45, R Ex. 19(a) pg. 6-16, (b) 1:45-3:35) Hernandez expressed disappointment in the comments and pointed out that he thought he did a lot of good work. (R Ex. 19(a) pg. 17-18, (b) 3:38-9:21) He also noted his disappointment with the length of time he would not be allowed to apply for promotions due to the Kopack discipline being on his record. (R Ex. 19(a) pg. 16-18, (b) 11:43-14:07). He was told that he should, "Touch base with those Coordinators periodically" to show management his efforts to improve. (Tr. 44, R Ex. 19(a) pg. 24, (b) 20:16) Seeing that this news was upsetting to Hernandez, Westfall allowed him to take a "breather" after the March 1 meeting before going back to work. (R Ex. 19(a) pg. 28, (b) 21:28) Finally, Winchester said that his door was always open to Hernandez. (R. 19(a)pg. 29, (b) 24:45) This interaction and outcome, are at odds with Respondent's characterization, at trial, of Hernandez's behavior at the meetings.

On or about April 12,⁹ Hernandez met with Human Resources Representative Alyssa Westfall to again discuss overturning the Kopeck discipline. (Tr. 51) The recording of this meeting, which was offered as evidence by Respondent, establishes again that Hernandez

⁸ Hernandez subsequently figured out that Winchester was confusing him with another employee named Paul who is known for isolating himself in the lab. (GC Ex. 4(a) pg. 22, (b) 12:22)

⁹ Hernandez dated the recording April 12, 2019. J. Ex. 15 dates the meeting as April 10, 2019 with Alyssa Westfall.

maintained an appropriate tone, did not lose his composure even when he spoke about his fiancée Brittany Mucha being sexually harassed. Rather, he was professional and calm throughout the conversation. (R Ex. 20)¹⁰

At this meeting, Hernandez contended again that it was unfair for him to be disciplined for what he believed was an innocuous comment while other employees had violated rules and policies, but were not punished. (R Ex. 20(a) pg. 38-40, (b) 25:23) Hernandez said that he was losing potential promotions because of the Kopack discipline. (R. Ex. 20(a) pg. 28, (b) 20:20) He then mentioned that Mucha had accused Coordinator Tyler Rogers of sexual harassment but nothing had happened to him.¹¹ (R. Ex. 20(a) pg. 34, (b) 25:25) Hernandez also stated that he had spoken with Coordinator Kopack about the incident that led to his discipline and was told that Kopack did not find the comment troublesome. (Tr. 55, R Ex. 20(a) pg. 29, (b) 21:52) The recording of this meeting establishes that during the meeting, Respondent raised no objection to Hernandez speaking with Kopack. Hernandez stated that he would keep fighting the discipline because he believed it was unjustified until it was removed or he was terminated. (R. Ex. 20(a) pg.32, (b) 24:05).

Despite submitting this recording as evidence in its case in chief, Respondent at trial claimed that Hernandez engaged in some form of misconduct at the April 12 meeting – a claim not supported by Respondent’s own audio evidence. (Tr. 82). Even to Hernandez’s insistence that he would continue to challenge the Kopack discipline until it was removed or he was discharged, Westfall’s response was to simply say, “you have not done anything terminable.” (R. Ex. 20(a) pg. 32, (b) 24:11) Westfall never told Hernandez to stop making such comments or

¹⁰ As noted earlier, this exhibit was admitted by all parties. The transcription lists Hernandez and two unidentified female speakers. Westfall admitted at trial that she discussed unions at Respondent with him at this meeting as reflected in the recording. (Tr. 296)

¹¹ Respondent contends that Mucha never made such a complaint. (Tr. 276)

disciplined him for making them. At trial, Hernandez admitted that he had said that he would not accept that he did anything worthy of the punishment he received for the Kopack incident or that Mucha was not sexually harassed unless Kopack, Mucha or Dr. Mordechai told him that he was wrong about the incidents. (Tr. 142, R Ex. 20(a) pg. 44, (b) 38:16) Respondent contends that Hernandez's comments at this and other meetings were the basis for his discharge, but Westfall's reaction to them at the time of this meeting bely this claim. Westfall did not tell him not to make such comments, give Hernandez a warning or otherwise indicate that his statements were insubordinate or inappropriate. Indeed, despite the passage of more than a year since the April 12 meeting, the instant trial was the first time that Respondent claimed outrage at Hernandez's comment about continuing to challenge the Kopack discipline.

At the April 12 meeting, Hernandez also raised the issue of his schedule being changed so that he could work on Mondays, a day that Rogers did not work. Hernandez asserted that it was difficult for him to work on other days and see Rogers flirt with employees, or to see Coordinators instagramming on their phones instead of working, or to see them using obscenities when they were training other employees and to hear them gossiping about other employees.¹² (R Ex.20(a) pg. 38-40, (b) 32:01). Based on the audio recording of this meeting, Westfall did not raise any objection to Hernandez speaking about the conduct of other employees and did not tell Hernandez to stop making or requesting meetings to make such comments or report on the behavior of other employees. In fact, Westfall acknowledged that Hernandez "cared about this job and company" and that his attitude was a good fit for the company. (R. Ex. Pg.42 (b) 36:30) When Hernandez later again brought up the conduct of other employees in the meeting and said

¹² The Employee Handbook prohibits "Yelling, screaming, use of obscenities or foul language." (J. Ex. 12, pg. 37)

that he only wanted to be treated fairly, her response on the audio was “Okay.” (R. Ex. 20 (a) pg. 49, (b) 43:31)

Finally, during the April 12 meeting, Hernandez asked Respondent whether it had a union. He asked Westfall if there was a union at the facility and was told no. (R Ex 20(a) pg. 33, (b) 24:35) He was told that under the law, Respondent could not prohibit the Union, but that it did not encourage it either. (Tr. 62, 76, 296, R Ex. 20(a) pg. 52, (b) 45:31) Westfall admitted that she had a conversation with Hernandez about union. (Tr. 296)

On June 9 Hernandez met with Berry about his unauthorized use of Mucha’s password. (Tr. 342, J. Ex. 15) This was a terminable offense. Notwithstanding the severity of the offense, Hernandez was not discharged or disciplined for it. Instead he was “counseled” by Berry who testified that Hernandez was acting in the interest of the company and had shown remorse for the action. (Tr. 342). Notably, this was not a basis relied on by Respondent in deciding to discharge Hernandez.

Hernandez had two meetings with management on June 14, 2019. One was with a group of Coordinators to get feedback on his work performance. (GC Ex. 4) The other meeting was with Human Resources official Lisa Totin¹³ and involved Hernandez asking again for his schedule to be changed so that he could work on Mondays. (GC Ex. 5) Unlike Respondent’s characterizations made at trial of Hernandez’ behavior, the recordings of these meetings reflect that Hernandez was very at ease and that these meetings were actually rather pleasant, with

¹³ As noted previously, the parties agreed to the admission of the recordings and their respective transcripts. Although several voices were not identified in both Respondent’s exhibits and those of Acting General Counsel, neither raised objections that the recordings were with anyone other than Hernandez and Respondent’s officials. Further, the Hernandez testified without objection to meeting with Totin and discussing issues that are reflected in the recording. (Tr. 52) Finally, voice in this recording seems to match that of Totin in another recording where she was identified.

Hernandez and Respondent officials even ending the second meeting with an extensive discussion about cars. (GC Ex. 5(a) pg. 17-32, (b) 9:00)

Prior to the June 14 meeting with the group of Coordinators, Hernandez had several informal meetings with individual Coordinators to review his performance. (Tr. 43-46) These included a meeting with Kopack, a meeting with Coordinators Brianna Squilla and Chelsea Johnson and one with Mucha. (Tr. 45) These meetings were not recorded. Hernandez then met on June 14 with Coordinators Bahvina Patel, Rachel Sanford and Tyler Rogers as a group, to review his performance. This meeting was recorded. (GC. Ex 4).

The recording of the meeting with the Laboratory Coordinators shows that they all stated that Hernandez was a good employee who had little, if anything, to improve upon. (Tr. 45-46, GC Ex. 4(a) pg. 9, (b) 4:17) He was told that the Coordinators actually felt very comfortable knowing that Hernandez was in the Laboratory and that it was good to have him as a backup if anything went wrong. (GC Ex. 4(a). Pg. 11, (b) 5:49) He was told that he was one of the stronger lab techs and could be trusted to go anywhere needed in the Laboratory. This was reflected in that the Laboratory did not “skip a beat” when he took over and worked as Mucha’s replacement when she was out for several weekends. (GC Ex. 4(a) Pg. 21, (b) 16:58) The Coordinators promised that Winchester would know how the meeting went. (GC Ex. 4(a) pg. 31, (b) 17:49)

Later that day, Hernandez went to drop some papers off at HR¹⁴. He was asked to stop in and talk by the Human Resources representative Lisa Totin. Hernandez made a recording of this meeting (GC Ex. 5) He asked about working on Mondays. Hernandez explained that Mondays were the best option for his schedule and that he was willing to wait for an opening to come up

¹⁴ It is unclear from the recording what these documents were but Hernandez states that they were papers to support his ADA claim so that his schedule could be changed. (Tr. 59)

for that day. (GC Ex.5(a) pg. 6-7, pg. (b) 2:57, 8:55) Totin provided Hernandez with alternatives to working on Mondays as Respondent did not have a current need for another person to work on Monday. (Tr. 129, GC Ex. 5(a) pg. 6, (b) 1:56) The recording reflects that Hernandez was never told during this meeting that he should stop making this request to work on Mondays. (GC Ex. 5) In fact, the recording establishes that Hernandez was encouraged to keep asking when Totin told him that the subject could be revisited. (GC Ex. 5(a) pg.15, (b) 8:30)

Hernandez went on paternity leave on July 5. Sometime before leaving he submitted paperwork under the Americans with Disabilities Act in support of his request to change his schedule. (GC Ex. 3, J. Ex. 15) Upon his return, Hernandez met with Lisa Totin and Brianna Reed on September 27, 2019 to discuss the issue. This meeting was also recorded and the recording was offered into evidence by Respondent. (R Ex. 21) Again, the recording reflects that Hernandez was composed and even tempered during this September 27 meeting. Once again, Respondent's claims at trial are contradicted by its own evidence.

During the September 27 meeting, Hernandez was told that his request to move to Mondays was again denied. (Tr. 48) He replied that he did not understand why, as other employees had been allowed to alter their schedules to Monday positions. (Tr. 49, R Ex.21(a) pg.4, (b) 1:33) Reed replied that she was unaware of this but would look into it. (R. Ex. 21(a) pg. 4-5, (b) 1:48) Although Hernandez raised the conduct of other employees during this meeting, the recording indicates that Hernandez was not disciplined, given a warning or told to stop making such comments. At trial, Reed admitted that Hernandez was not plainly told to stop raising these issues, but rather that she and Totin had "implied [for him] to stop." (Tr. 204) Like previous meetings, neither Reed or Totin expressed displeasure with Hernandez's reports. In fact, when Hernandez raised other employees' infractions of the Laboratory Safety Guidelines such as chewing gum, not wearing lab coats and not wearing gloves, Reed and Totin replied that

increased spot checks were being made, suggesting that Respondent had listened to his concerns. (Tr. 49, R Ex.21(a) pg. 31, (b) 28:22) Totin and Reed then again explained that Hernandez's request to work on Mondays was denied because Respondent did not need him to work that day. However, when Hernandez asked if working Mondays was off the table, Reed replied that "It's no more off the table than any other day of the week." (R. Ex. 21(a) pg.23, (b) 19:16) Further, when the meeting ended, Hernandez was told that a meeting would be scheduled with Kelly Winchester to discuss the issue of his schedule change and concerns. (Tr. 50, R Ex. 21(a) pg. 35 (b) 28:58). At no time was Hernandez told that changing his schedule to Mondays was not possible at all and that he should stop making the request. Notably, Respondent acknowledged that a move to Mondays was still a possibility when it said that Hernandez could apply to any and all open positions. (Tr. 226)

D. Hernandez's Union Activity

Hernandez contacted the Union in late September 2019. He reached out to the Union due to the mistreatment he was suffering at his job and the lack of help he felt he was getting from Respondent's Human Resources department. (Tr. 61)

On September 27, Hernandez was contacted by Union agent Sonia Martinez (Tr. 26, 61). They had a brief conversation at that time but agreed to speak later to further discuss the Union. On September 30, Hernandez contacted Martinez to continue their discussion about the Union and the process for organizing Respondent. (Tr. 28) At the end of the conversation, Martinez asked if Hernandez could attend a Union conference the next week. (Tr. 28-29) Hernandez told Martinez that he would definitely attend the Union conference.

Hernandez attended the Union conference on October 7 and 8 at Sand's Casino¹⁵ in Pennsylvania. (Tr. 30, 62-63) During their talks at the conference, Martinez explained the process to get Union representation. This included employees knowing their rights and Martinez getting information about employee schedules so that the Union could get an idea of the situation at Respondent. (Tr. 28-29) Martinez then explained that Hernandez should not draw any unwanted attention from Respondent. He was told that he should get to work on time and not to do anything that Respondent could latch onto to discharge him. (Tr. 29-30) Martinez also said that the Union would offer assistance if Hernandez was discharged for Union activity. (Tr. 30, 32)

Hernandez went to work on October 11, for his usual 11:00 a.m. to 11:00 p.m. shift. (Tr. 40, 63, 72) This was his first day back after meeting with the Union. He worked in the Laboratory in the Acoustic PCR room that day. (Tr. 73) During the course of the day, Hernandez individually spoke to several employees about his activities that weekend, including his meeting with the Union. Hernandez spoke while he and the individual employees waited for certain machines to process samples. Employees often engaged in small talk when the machines were running so this was not unusual. (Tr. 65) Hernandez spoke to employees Brianna Squilla, Monica Carey, Sam Marcos and Shivam Patel. (Tr. 65, 72-73)

At about 1:33pm on October 11, Hernandez sent an email to Brianna Reed. (Tr. 64, J Ex. 1) In it, he stated that he learned of a possible opening on the Monday shift due to a termination and inquired if he could now be switched to Mondays. (Tr. 64) The email then reported that employees were not following Respondent's rules by not wearing lab coats and gloves as required under Respondent's Laboratory Safety Guideline number six. Although Hernandez

¹⁵ Due to a transcription error, the transcript incorrectly indicates the name of the casino as "Sam's Casinos" Acting General Counsel herein moves that the record be corrected to reflect the true statement.

referenced a report he had made several weeks earlier about Tyler Rogers discussing sports betting, his email focused primarily on Rogers not wearing a lab coat or gloves while working in the Laboratory that day, as well as two other employees also not wearing their lab coats.

Hernandez then warned that this could cause problems for Respondent if the behavior is noticed in an upcoming CAP¹⁶ inspection and thus was clearly in Respondent's best interest to address.

As noted earlier, Laboratory employees *must* wear lab coats and gloves. (J. Ex. 12 pg. 27, J Ex. 9 item six) Hernandez had made very similar reports before without repercussion. Respondent did not immediately reply to Hernandez's email.

E. Hernandez is Discharged for "Loss of Trust" Shortly After Respondent Learns of his Union Activity.

At about 3:43pm, Reed received an email from employee Shivam Patel stating that Hernandez was speaking to employees about the Union. (Tr. 293, J Ex. 4) At 4:14pm, Reed emailed both Hernandez's 1:33pm email and Patel's 3:43pm email, to her direct supervisor Alyssa Westfall and another manager Michele Guenther. Westfall then passed these emails up the chain to Pete Winchester and Stephanie Berry at 4:19 pm. (J Ex. 11) At approximately 4:32pm, Reed prepared termination documents including a Time Off Balance sheet. (J. Ex. 7). According to Berry, these documents take only minutes to prepare. (Tr. 356)

Shortly before 5:00 p.m., Hernandez returned from lunch and was told by the secretary to the Laboratory Director, Denise Binder, that human resources need to speak to him immediately. (Tr.67) This was about 1 hour after Respondent learned of his Union activity. (Tr. 67) Reed, Berry and Pete Winchester met with Hernandez. (Tr. 67) At the meeting, Reed informed Hernandez that he was terminated for "Loss of Trust" (Tr. 68, R. Ex 22(a) pg. 3, (b) 0:10). It is

¹⁶ CAP is a service that inspects and certifies laboratories for accuracy or tests, professionalism, cleanliness and other criteria. A CAP certification is highly regarded in the Laboratory Testing field. (Tr. 123-124)

worth noting that based on Respondent's records produced in response to General Counsel's subpoena, no other employee has been discharged for "Loss of Trust," except Hernandez. (J. Ex. 13 and 14) Reed explained that Respondent had determined that Hernandez was not acting in its best interest in that Hernandez had been acting outside the parameters of his job. (Tr. 68 R. Ex. 22(a) pg. (b) 0:18) In short, Hernandez's repeated reports to Human Resources of employees' violating Respondent's actual Laboratory Safety guidelines and Employee Handbook rules of not wearing lab coats and gloves and other possible violations, was the basis of his discharge, even though the Employee Handbook states that such reports must be made. (J. Ex. 12 pg. 37) Reed stated that he had been warned about this conduct, even stating that she was present during meetings where he was told to stop the behavior. (Tr. 68, R. Ex. 22 pg. 4, (b) 0:52) Hernandez denied that he was ever given such a warning. (R. Ex. 22(a) pg. 4, (b) 0:54) When Hernandez asked whether he was terminated because of his Union activity, Reed replied that she had no idea what he was talking about. She falsely said that that was the first time she heard anything about his Union activity. Berry and Winchester were silent during this conversation, although all three had seen Patel's email at this point. (R Ex. 22(a) pg. 8, 22(b) 2:38) Hernandez accepted the termination.

Hernandez made a recording of this meeting. (R. Ex. 22) The recording confirms that Hernandez did not exhibit anger, was not combative or inappropriate. Rather, he matter-of-factly said that the AFL-CIO would represent him (R. Ex. 22 (a), pg. 8, 22(b) 3:00)

III. ARGUMENT

1. RESPONDENT UNLAWFULLY TERMINATED MIGUEL HERNANDEZ

The Wright Line Standard

The complaint alleges that Respondent discharged Hernandez on October 11, 2019, in retaliation for his Union activity. It is therefore necessary to evaluate Respondent's decision to

discharge Hernandez under the Board's well-established *Wright Line*¹⁷ analysis. Under the traditional *Wright Line* test, the General Counsel has the initial burden of establishing that an employee's protected activity was a motivating factor for the adverse employment action taken against the employee. The General Counsel meets this initial burden by showing: 1) that the employee was engaged in protected activity, 2) that the employer had knowledge of that activity; and 3) that the employer harbored animus towards the employee's protected activity. See, e.g. *Lee Builders, Inc.*, 345 NLRB 348, 349 (2005); *Willamette Industries, Inc.*, 341 NLRB 560, 562, 563 (2004); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).

Once General Counsel makes a prima facie showing that protected conduct was a motivating factor in the employer's adverse employment action, the burden of persuasion shifts to the employer to prove that it would have taken the same adverse employment action, even in the absence of the employee's protected activity. *Hunter Douglas, Inc.*, 277 NLRB 1179 (1985) (employer must prove by a preponderance of the evidence that the challenged personnel action would have taken place regardless of employee's protected activity). The employer cannot carry this burden merely by showing that it had a legitimate reason for the action, but must persuade by a preponderance of the evidence that the action would have in fact taken place even absent the protected conduct. *Williamhouse of California, Inc.*, 317 NLRB 699, 715 (1995) citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984)); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). If the employer's asserted reasons are found to be false or pretext, the Board may infer that the reason for the discharge was unlawful. *Yesterday's Children, Inc.*, 321 NLRB 766, 768 (1996) citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). But see *Electrolux Home Products, Inc.*, 368 NLRB No. 34 (2019), wherein the Board

¹⁷ *Wright Line, Inc.*, 251 NLRB 1083 (1980), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983).

found that pretext alone is not enough to find an action unlawful. General Counsel has the burden to also show that the action was the result of unlawful motivation. Finally, an employer should be found to have violated the Act if it fails to satisfy its burden of persuasion. *Id.*

i. The Record Establishes that Respondent Discharged Miguel Hernandez in Retaliation for His Protected Union Activity

a. *Hernandez engaged in Protected Union Activity.*

The evidence established that Hernandez engaged in protected Union activity. The testimony showed that he contacted the Union and then spoke with employees to gauge their interest in the Union. He spoke to employees about the Union on October 11, the day he was discharged. Respondent did not dispute this fact.

b. *Respondent Had Knowledge of Hernandez's Union Activity Prior to Deciding to Discharge Him*

There is no question that the Respondent knew of Hernandez's Union activity prior to its decision to discharge him. Respondent's witnesses admit that Reed received Patel's 3:43pm email that said that Hernandez was speaking to employees about the Union. The record evidence does not support Respondent's claim that it learned of Hernandez's union activity *after* it decided to terminate him. (Tr. 241, 307)

Respondent witnesses Reed, Berry and Westfall state that Respondent decided to fire Hernandez at about 2:00pm. (Tr. 205, 209, 342) However, Respondent failed to produce any evidence to support this assertion. There are no contemporaneously made notes, minutes or other documentation of the discussion to terminate him. (Tr. 306) When questioned at trial, Berry confirmed that they made the decision to terminate Hernandez without printing out or forwarding a copy of his 1:33 p.m. email, the cause of his discharge, for Berry to review. (Tr. 342, 354) Hours after they allegedly made the decision to terminate Hernandez, however, Reed forwarded Hernandez's and Patel's emails up the chain to Westfall, Berry and Winchester.

Respondent alleges that this was done so a response could be crafted to answer any questions Patel or any other employee may have had about the Union. However, Respondent never issued such an explanation to its employees nor did even provide one at trial. (Tr. 306-307)

Respondent, version of the facts surrounding Hernandez's termination simply defies logic. The only reasonable interpretation is that Respondent was not concerned with Hernandez's 1:33 p.m. email at all until it learned of his union activity in Patel's email sent to Reed at 3:43 p.m. Sending both emails together up the chain at that time to decide what to do about his Union activity is logical. The true timing of the decision to discharge is further reflected in that the only evidence that shows when Respondent started the termination process was J. Ex. 7, which shows that calculations were made at 4:32pm, after Respondent was aware of his Union activity. The proximity in time of his discharge to when Respondent's decision makers learned of Hernandez's Union activity reveals Respondent's unlawful motivation in discharging Miguel Hernandez. *Sawyer of NAPA*, 300 NLRB 131, 150 (1990).

c. Respondent's Anti-Union animus

The record evidence establishes that Respondent held anti-Union animus. Direct evidence need not be established to show anti-union animus. Animus may be inferred from the overall circumstance of an adverse action "where...the surrounding facts tend to reinforce that inference." *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d at 470 (6th Cir. 1991). "Timing alone may be sufficient to establish that union animus was a motivating factor in a discharge decision." *Sawyer of NAPA*, 300 NLRB 131, 150 (1990); *Manor Care Health Services-Easton*, 356 NLRB 202 (2010); *LaGloria Oil & Gas*, 337 NLRB 1120. In this regard, the timing of the adverse action in relation to employer knowledge of Union activity can be used to show animus. *Montgomery Ward & Co.*, 316 NLRB 1248 (1995); *State Plaza, Inc.*, 347 NLRB 755 (2006).

The close proximity in time, just over one hour and fifteen minutes, between Respondent's receipt of Patel's email and Hernandez's discharge shows animus.

Respondent's explanation of its decision to terminate Hernandez is further undermined by Westfall's statement at the April 12 meeting that Respondent disfavored Union activity. After Hernandez asked Westfall whether Respondent had a union and was told no, Westfall then told Hernandez that although Respondent could not prohibit a union, it also would not encourage it. (Tr. 62, 76, R Ex. 20(a) pg. 52 20(b) 45:59) When expressed against the backdrop of all the circumstances, such a statement indicates that Respondent did not have much patience for unionization. *Shattuck Denn*, supra.

ii. Respondent's Defense Fails

Respondent contends that it discharged Hernandez because it had had enough of his complaints about other employees. At trial, Respondent made a point of calling Hernandez's actions "tattling". (Tr. 18, 164) It referred to him as a troubled employee who believed that the rules did not apply to him. (Tr. 18) Despite its purported frustration with Hernandez's conduct, Respondent's witnesses admit that Respondent tolerated this conduct for almost 9 months without comment or action against Hernandez's alleged misconduct. This fact, combined with the timing of the discharge decision relative to Respondent learning of Hernandez's Union activity, just over one hour, strongly supports the conclusion that Respondent's defense is pretextual and was unlawfully motivated. *Electrolux Home Products, Inc.*, 368 NLRB No. 34 (2019)

a. *Respondent's Purported Defense is Pretextual.*

A respondent's defense is pretextual when the stated reasons for its actions are either false or not in fact relied upon. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). The burden to prove pretext is with the General Counsel. see *New York Telephone*, 300 NLRB 894

(1990), enfd. Mem 940 F.2d 648 (2nd Cir. 1991). General Counsel must also show that a respondent's alleged unlawful action was unlawfully motivated. *Electrolux*, supra. The evidence adduced at trial makes clear that Respondent's defense is pretextual and Hernandez's discharge was unlawful.

Respondent's stated reason for terminating Hernandez on October 11 was that the email that he sent at 1:33 p.m. showed his continued campaign of 'acting outside the parameters' of his job. Respondent claims that Hernandez was not authorized to "monitor misconduct" as he stated in the final paragraph of his email and his statement that he'd continue to do so constituted misconduct worthy of discharge. However, the email said nothing different than what Hernandez had been saying and doing for months without Respondent disciplining him or expressing a negative view toward his behavior. In fact, Respondent seemed to acknowledge the value of Hernandez's reports when it admitted to him that more spot checks were being done to ensure employees compliance with its policies. (Tr. 49, 253, R. Ex. 21(a) pg. 31 22(b) 28:19) Further, Respondent's alleged displeasure with Hernandez's comment about continuing to challenge the Kopack insubordination discipline until it was removed or he was discharged, is directly contradicted by its total inaction when Hernandez initially made the statement and by his conduct being tolerated for approximately 6 more months *afterward*. It should be noted that Hernandez's use of Mucha's password occurred not only after Hernandez made this statement was made but also after he made complaints about other employees, and he was not terminated for the password offense. Respondent is further betrayed by the recordings of the six meetings between Hernandez and various officials of Respondent which show that he was never told to cease his behavior and that management was not particularly troubled or upset by his statements and assertions. The only real difference between Hernandez's prior conduct and his 1:33 p.m. email is that it came on the day Respondent learned of his protected union activity.

During cross examination, each of Respondent's witnesses was asked if they ever told Hernandez that he had to stop this behavior. Each reluctantly admitted that they did not. An employer's failure to provide evidence of its dissatisfaction with an employee's work habits, when such habits are the employer's reason for disciplining that employee, has been found to be "a highly significant indication of discriminatory motivation." *Salisbury Hotel*, 283 NLRB 685, 695 (1987). In *Salisbury*, the employer discharged an employee because of her supposed long history of misconduct including insulting customers who call in to an 800 number by referring to them as "cheapies", arguing with managers, failing to confirm reservations, taking personal calls on work phones and doing her hair and make-up while on duty at her desk. The employer, however, never disciplined her for these infractions. The Board found that because it failed to produce any disciplinary records for these infractions, the employer tolerated the conduct and its defense was pretextual. Like in *Salisbury*, Respondent here failed to produce any discipline issued to Hernandez for the alleged misconduct which they allegedly discharged him for. Thus, the only conclusion that can be drawn is that Respondent condoned this conduct until the Union came into the picture.

The pretextual nature of Respondent's defense is also shown by the fact that on several occasions, Respondent's officials actually suggested that Hernandez continue to meet with them. (i.e. Pete Winchester and Westfall's suggestion that Hernandez meet with Coordinators on how to improve his work habits during March 1 meeting and Totin's promise to have a meeting with Kelly Winchester to further discuss a schedule change at the September 27 meeting.) At trial, Respondent witness Reed claimed that she was tired of the "same things" over again, but it was she and Respondent's other officials who repeatedly suggested that Hernandez keep meeting to discuss these issues. Respondent's claim that Hernandez's behavior was considered misconduct when it actually helped encourage that behavior, shows pretext.

Respondent never stated that what Hernandez was complaining about was not justified. Respondent's Laboratory Safety Policy (J Ex. 9) clearly laid out safety violations, such as not wearing lab coats and gloves. Hernandez's complaints clearly touched on such safety violations. He also complained the use of profanity when training others. These are not made up violations, but actual rules which Respondent's Handbook require employees to report. (J. Ex. 12 pg. 27, 37 J. Ex. 9) That Hernandez reported these to Human Resources rather than Laboratory management is of no consequence. However, that Reed stated that Hernandez reporting these to HR rather than the Laboratory was a major reason for his termination is of consequence. Implicit in what Reed said is that had Hernandez reported these to Laboratory management first rather than HR he would not have been fired. In her direct testimony, she says, "...but for the actions that were concerning and what we considered loss of trust were him reporting employees for different violations to the HR Department." (Tr. 217) This is even though the Employee Handbook states the he could report violations to either the Laboratory or to Human Resources. (J. Ex. 12 Pg. 37) Again, at no time was Hernandez ever told to report the violations to laboratory management rather than Human Resources. (Tr. 262) That he was terminated, without warning, for complying with the Respondent's own Handbook further shows that Respondent's defense is pretextual.

b. *The Timing of the Discharge Shows Unlawful Motivation*

The Board and courts have repeatedly held that the timing of an adverse action in relation to knowledge of union activity is powerful evidence that the adverse action was unlawfully motivated. *Trader Horn of New Jersey*, 316 NLRB 194 (1995); *Mondelez Global, LLC*, 369 NLRB No. 46 (2020), *Jet Star, Inc. v. NLRB*, 209 F.3d 671 (7th Cir. 2000). Here, Hernandez was discharged just over an hour after Respondent had clear proof of his Union activity. Although Respondent claims that it made the decision prior to learning of the activity, as detailed above,

the credible evidence makes this highly unlikely. That Respondent tolerated Hernandez's conduct for months without issue then terminated him because of the same conduct, which was reflected in the 1:33 p.m. email, strains credulity. That Respondent would terminate Hernandez immediately after learning of his Union activity is a far more logical explanation. No other explanation is supported by the record. This point is further underscored in that Westfall's explanation of both the Hernandez's 1:33 p.m. email and Patel's 3:43 p.m. email being forwarded to her and other officials after 4:14 p.m. so that Respondent could prepare a response to Patel and other employees about the Union, is nonsensical. No such follow-up was ever sent to Patel or any employee. (Tr. 306-307) The Board has found that pretext can be found when a respondent does not follow-up on an alleged issue or transgression that led to discharge. see *GATX Logistics, Inc.*, 323 NLRB 328 (1997)

Because the timing and rationale for Respondent's action do not stand up to scrutiny, General Counsel has met its burden under *Electrolux* in that there is no other reasonable, non-pretextual rationale for Respondent's discharge of Hernandez so close in time to learning of his Union activity. Respondent, meanwhile, has failed to meet its burden under *Wright Line*. The evidence proves that Miguel Hernandez was unlawfully discharged as alleged in the complaint.

2. RESPONDENT'S WITNESSES ARE NOT CREDIBLE

In order to evaluate the relevant facts and to determine what weight to give witnesses' testimony, certain credibility resolutions must be made. The record evidence clearly demonstrates that the Acting General Counsel's witnesses testified in a detailed, consistent, and forthright manner throughout the trial. Respondent's witnesses were vague and made gross generalizations, exaggerations and overstatements in their responses. In addition, in stark contrast to Hernandez and Martinez, the testimony of Respondent's four witnesses was contradictory and not supported by the recordings.

Brianna Reed

Brianna Reed was the Human Resources Liaison to the Laboratory. She worked for Respondent for several years. Remarkably for an experienced human resources representative, Reed stated that she had no idea what a union or what unionization was and incredibly, claimed to have never heard of the Teamsters Union. (Tr. 256)

Reed met with Hernandez on April 12, and September 27 and she was the person responsible for terminating him on October 11. Reed claimed that she was present at meetings where Hernandez was told he should stop his behavior. (R. Ex. 22(a), p. 4, 22(b) 0:58) This is not true, however. Reed admitted at trial that no such direct warning was given. (Tr. 204) On October 11, shortly after the September 27, 2019 meeting, she received an email from Hernandez asking for a schedule change and again reporting the policy violations of other employees, something he had done for months, unchallenged. At trial, during her direct examination by Respondent's counsel, Reed asserted that Hernandez bringing his complaints to HR rather than lab management was a driving force in his termination and that the line in the email where Hernandez said that he would "continue to monitor misconduct" was the comment that caused his discharge. (Tr. 204) This statement is simply not credible. Hernandez's sentiment and conduct were not new or troubling to Reed or Respondent for months leading up to October 11. In fact, Hernandez told HR Manager Westfall, during the April meeting about the misconduct of other employees and continued the practice even up to his meeting with Totin and Reed on September 27. When Hernandez asked if his termination was due to his speaking about the Union, Reed stated that she had no idea what he was talking about which was untrue. (R. Ex. 22(a) pg. 8 22(b) 2:27) Reed knew of Hernandez's involvement with the Union since she had already received Patel's email at the time she was asked. She could have easily said his Union activity was not a cause for the discharge, as Respondent now asserts at trial, rather than

deceptively feigning ignorance. For all the above reasons, Reed's direct testimony cannot be credited.

Kelly Winchester

Kelly Winchester is the VP of the Laboratory. (Tr. 314) She and Pete Winchester are married. (Tr. 325) She was not involved in the decision to terminate Hernandez. Her testimony was self-serving in that she claims that Hernandez was a troubled employee who she wanted fired for some time. (Tr. 317) She states that his complaining was not good for the laboratory since he was not working, but away from his post often. (Tr. 322) The Coordinators who actually supervisor Hernandez, however, contradict this. (GC Ex. 4) She admits that she did not have much personal interaction with Hernandez and that she never called Hernandez into her office to discuss his behavior. (Tr. 315, 329) Her testimony should not be given weight under these circumstances.

Alyssa Westfall

Allyssa Westfall is Respondent's Human Resource Manager. (Tr. 269) Westfall states that she had several meetings with Hernandez where he had brought up the same subjects but admits that she and other managers kept granting the meetings and never told Hernandez to stop raising the same issues. (Tr. 274) This was even though she knew Hernandez said that he was not going to drop the issues. (Tr. 300-301). Reed stated that she was at the meeting with Berry and Westfall at 2:00 p.m. where the three decided that Hernandez's 1:33 p.m. email was worthy of discharge. Yet, Westfall contradicts this when she stated that Reed was not present for this discussion. (Tr. 270, 282). Her explanation that Hernandez's 1:33 p.m. email and Patel's 3:43 p.m. were forwarded at the same time at 4:14 p.m. to Berry so that a response to any questions that employees may now have had about the union could be drafted, is illogical, particularly since no such response was ever issued.

Stephanie Berry

Stephanie Berry is Respondent's Vocational Specialist. She oversees Human Resources for the 22 entities related to Respondent that covers about 1,400 employees. (Tr. 336) In 2019, her title was Human Resources Director. She states that Human Resources repeatedly told Hernandez to stop making his complaints (Tr. 346, 349) This not true and contradicted by the record. The recordings of the meetings indicate that Hernandez was never told to stop the complaints.

In summary, Respondent's witnesses are not credible and their explanation for Hernandez's termination cannot be credited.

V. CONCLUSION

Counsel for the Acting General Counsel submits that the credible record evidence soundly supports a finding that Respondent violated the Act as alleged in the Complaint and Notice of Hearing. The evidence establishes that Respondent violated Section 8(a)(3) by discharging Miguel Hernandez because of his activities and support for the Union.

Counsel for the Acting General Counsel respectfully requests that the Administrative Law Judge issue a remedial order requiring Respondent to reinstate Miguel Hernandez to his former position with loss of seniority of benefit and that Respondent make him whole for any loss he may have incurred as a result of Respondent's unlawful action.

Dated at Newark, New Jersey, April 5, 2021

Respectfully Submitted

/s/ Henry J. Powell

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CERTIFICATION

This is to certify that copies of the foregoing Counsel for the Acting General Counsel's Post-Hearing Brief to the Administrative Law Judge have been duly served on the Administrative Law Judge, Respondent's counsel, Charging Party's counsel on April 5, 2021 as follows:

BY ELECTRONIC FILING

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ADMINISTRATIVE LAW JUDGE
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